THE OFFICE OF MAGISTRATE.

SECOND EDITION.

HAROLD WRIGHT.

THE

OFFICE OF MAGISTRATE.

BY

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PREFACE.

In the following pages the Author has endeavoured to lay, in a short and readable form, before the reader the description and origin of the Office of Magistrate, how he is called upon to act, the weight he should attach to the various kinds of evidence, the powers of punishment, and the principles that should guide him in the exercise of his discretionary powers. He acknowledges with pleasure the valuable suggestions made to him by his friend, W. C. A. Neville, Esq., of the Inner Temple, and Stipendiary Magistrate for Wolverhampton and district; and the aid derived from the undermentioned works:—Reeves' History of English Law, Archbold's Justice of the Peace, Glen's Summary Jurisdiction Acts, Taylor on the Law of Evidence, Stephen's General View of Criminal Law, and Cox's Principles of Punishment.

H. W.

5, Pump Court, Temple, E.C.,
December, 1888.

PREFACE TO SECOND EDITION.

THE favor with which those who hold the Office of Magistrate have received the first edition of this Work, renders a further edition necessary.

It is a great satisfaction to the Author to feel the book has answered the purpose with which it came before the public, and to know that it has met with a wide and kindly reception.

H. W.

5, PUMP COURT, TEMPLE, E.C.
July, 1892.

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THE OFFICE OF MAGISTRATE.

INTRODUCTION.

THE office of magistrate entails duties the importance of which is to be measured by the amount of regard a community pays to the liberty of the individual.

It has not been created by any sudden exigency, for, though it derives its jurisdiction entirely on special authority given and regulated by statute, its powers, defined as far back as the reign of Edward III, have been gradually developed and extended as the needs of society have demanded. Even at a time previous to that of Edward III we find persons holding offices for the maintenance of the public peace. These *conservators of the peace*, as they were called, claimed their power, either (α) by virtue of their office (from the Lord Chancellor to the constable), (β) by prescription, (γ) by the tenure of their lands, or (δ) by choice of freeholders.

The manner in which they might exercise their authority was by committing to custody *those whom they actually saw breaking the law*, or they might admit them to bail, or oblige them to give sureties for keeping the peace.

The unsettled state of affairs consequent on the dethronement and murder of Edward II made it necessary that new offices should be created, to be held by persons upon whom more trust could be placed than upon the old *common conservators of the peace.*

Hence by statute 1 Edw. 3, c. 16, it was enacted for the better keeping and maintenance of the peace, that in every county good men and lawful should be assigned to keep the peace. The writs for their institution were sent out *by the new king* to the sheriff. In this wise the freeholders lost the right of election which they had before exercised.

So greatly were the powers of these officers increased by subsequent statutes, that we find in the reign of Elizabeth the justices of the peace exercising *two* branches of jurisdiction—*the one* as conservators of the peace, in which they acted individually in a magisterial capacity whether by way of preliminary inquiry upon accusations of felony, or by a summary jurisdiction over minor offences—*the other* acting collectively under that part of their commission which gave them power to hear and determine certain offences, under which they were really a court of oyer and terminer.

In this reign a new and reformed commission of the peace was settled. The old one had been so successively padded with new statutes which were retained, though repealed or obsolete, that the size of the commission was enormous, and its contents unintelligible from recitals, repetitions, and the heaping together of various incongruous matters. This reformed commission of Elizabeth has been very little altered to the present

day. When for a borough, it now takes the following form :—

" *Victoria, &c.* *To the Mayor, &c.*

" *Know ye that we have assigned to you and every of you jointly and generally our Justices to keep our peace in and throughout the said borough of , and to keep and cause to be kept all ordinances and statutes made for the good of our peace, and for the conservation of the same, and to chastise and punish all persons that offend against the form of these ordinances or statutes or any one of them, in the aforesaid borough, as it ought to be done, according to the form of those ordinances and statutes ; and to cause to come before you or any one of you all those who, to any one or more of our people concerning their bodies or the firing of their houses, have used threats, to find security for the peace or their good behaviour towards us and our people, and if they refuse to find such security then imprison them in our prisons until they find such security, to cause and be safely kept. And wherefore we command you that you diligently apply yourselves to the keeping of our peace ordinances, statutes and all and singular other the premises and perform and fulfil the same in the form aforesaid, doing therein what to justice appertains, according to the laws and customs of England. In witness,*" &c.

The commission in the case of a county magistrate contains a further assignment giving them power to act at quarter sessions which the borough magistrate is precluded from doing.

From this *Commission of the Peace* the magistrate

derives his authority to act, and Parliament from time to time extends his jurisdiction and powers through the statute law. His functions are partly *judicial* and partly *administrative—judicial* in the determination of matters of offence and complaint, and those incidental to proceedings between plaintiff and defendant, prosecutor and accused—*administrative* in those matters of civil polity which are entrusted to a magistrate by virtue of his office, and which cannot be described as judicial in the ordinary sense of the term. (It may be here noticed that nearly the whole of the administrative business has now been transferred from the magistrates to the county councils by the Local Government (England and Wales) Act, 1888.)[1]

The procedure of their courts is chiefly regulated by two Acts of Parliament, Jervis' Act[2] and the Summary Jurisdiction Act.[3] In certain and exceptional cases and in certain respects a special procedure is provided under particular statutes. All justices are appointed to act within certain districts. If a justice be appointed to act within a county, or part of a county, he is known as a *County Magistrate.* If the district be a county corporate, city, or borough, he is a *Borough Magistrate.* Beyond these there are justices appointed under the provisions of the Municipal Incorporation Act to act within certain areas and to be paid for discharging their duties. These are called *Stipendiary Magistrates,* and they must be barristers-at-law of not less than five years' standing. They take no part in the sessional

[1] 51 & 52 Vict. c. 41. [2] 11 & 12 Vict. c. 43.
[3] 42 & 43 Vict. c. 49.

system, but otherwise have the power of *two* magistrates.

Touching the number of county or borough justices to be appointed there is practically no limit. To act for a county, however, the person must have a property qualification either in land of the value of 100*l.* per annum, or a reversion of 300*l.* per annum, or inhabit a dwelling-house assessed to inhabited house duty at 100*l.* per annum.

To act as a borough magistrate a property qualification is not necessary, and so long as a person has a residence within seven miles of the district he need not even be a burgess of the borough.

As the office is conferred by the Crown, so it subsists only during the Crown's pleasure. Apart from this, however, it becomes determinable:

1. By demise of the Crown (when put into commission again by the succeeding sovereign the magistrate is not sworn afresh).

2. By a new commission, which discharges all former magistrates whose names are not included in it.

3. By becoming sheriff. (This only disqualifies during year of shrievalty.)

4. By bankruptcy.

CHAPTER I.

THE MAGISTRATE.

The magistrate.

WHEN placed upon the commission a magistrate has the inherent right of exercising the full powers of his office anywhere within the boundaries of the county, district, or borough, for which he is appointed.

Jurisdiction.

County magistrates have concurrent jurisdiction with magistrates for the boroughs within their districts which have no separate courts of quarter sessions assigned to them. No part of a borough having a separate court of quarter sessions, however, will be within their jurisdiction where the borough was exempt therefrom before 1835.[1]

Divisions of counties for business purposes.

For the more convenient transaction of business every county is parcelled out into districts known as *Divisions*, and each *Division* has its own staff of magistrates (made up generally of those resident in the immediate neighbourhood), and its own separate court-house.

As a matter of custom and convenience, a magistrate being once attached to a *Division* does not concern himself with the business outside its limits. The jurisdiction of a magistrate being purely local, and

[1] 45 & 46 Vict. c. 50, s. 154.

having no coercive or judicial control without the particular district for which he holds his commission, certain cases arise where his jurisdiction might clash and be of non-effect.

Jurisdiction extended in certain cases.

It is provided, therefore, that,—where a person commits a felony in one county or district, and goes into or resides in another, a magistrate for the latter district may take his examination and commit him for trial. If, however, he does not feel justified in committing the accused, he must not be discharged, but sent back for the case to be again considered by some magistrate of the division in which the felony was committed [1] or,—where an offence is committed on or within 500 yards of the boundary of a county,[2] or goods fraudulently removed from one county to another,[3] the offender may be dealt with by magistrates of either county or,—when offences are committed in union workhouses comprising parishes of two or more counties, the magistrate of the county in which the workhouse is situate may commit the offender to the gaol of the county in which is situate the parish to which he is chargeable.[4] If the union extend into several jurisdictions, every complaint in which the guardians have an interest is deemed for the purposes of jurisdiction to arise and exist equally throughout the union [5] or,—where a warrant is issued for the apprehension of any person, and he is out of the jurisdiction of the magistrate issuing the warrant, the warrant may be executed by indorsement

[1] 11 & 12 Vict. c. 42, s. 22.
[2] 42 & 43 Vict. c. 49, s. 46.
[3] 24 & 25 Vict. c. 96, s. 114.
[4] 7 & 8 Vict. c. 101, s. 57.
[5] 30 & 31 Vict. c. 106, s. 27.

Backing the warrant.

by a magistrate of the county, district, or borough, in which the defendant is found.[1] This *backing the warrant*, as it is called, is merely a ministerial act, and the magistrate who issued it alone remains responsible for the arrest. Warrants may be executed without indorsement on *fresh pursuit* to a distance of seven miles from the boundary of the county or district in which the warrant was issued,[2] and summonses, or warrants, issued by borough magistrates may be executed in like manner in the county within which the borough is situate, or within seven miles of the borough.[3]

When appointed for two adjoining counties.

When appointed for two adjoining counties a magistrate may act in either upon matters arising in the other, provided he is in one of such counties at the time he so acts.[4] It is indispensable in the great majority of cases that there should be two or more justices acting together.

Power of magistrate when acting alone.

Any complaint or any information may nevertheless be heard and determined by *one* magistrate, *unless* the Act of Parliament upon which the complaint or information is framed requires the presence of two or more. But where, however, a magistrate acts by himself his power is limited, and he cannot inflict a higher penalty than twenty shillings, or a longer imprisonment than fourteen days.

One magistrate may also act alone in matters purely ministerial, such as,—taking the depositions in criminal proceedings, which are subsequently to be judicially determined by a higher tribunal,—matters with regard

[1] 11 & 12 Vict. c. 42, s. 11.
[2] 11 & 12 Vict. c. 43, s. 3.
[3] 45 & 46 Vict. c. 50, s. 223.
[4] 11 & 12 Vict. c. 42, s. 5.

to complaints, informations, summonses, warrants, commitments, and official formalities which do not involve any discretionary or judicial consideration.

The magistrate or magistrates hearing a charge need not be the same as those before whom it was laid. And so after the determination the commitment or warrant of distress may be made out by one who was not present at the hearing.

When two necessary must act together.

Whenever the concurrence of two magistrates is necessary for any judicial act they must be present and acting together during the whole of the case. If more than two sit together the chairman has no casting vote, and if the voting be equal it amounts to an acquittal.

Proceedings must be within time provided and amount within limit.

Before exercising any judicial interference a magistrate should be satisfied that the complaint or information was made within six calendar months from the time the proceedings arose, or within the time provided (if any) by the particular statute under which the proceedings were taken. If it be a question of money or goods it should be ascertained that the amount in dispute does not exceed that over which jurisdiction is conferred.

Bonâ-fide claim of right ousts jurisdiction.

When a bonâ-fide *claim of right* or *title* is raised by the defence, the jurisdiction of justices to hear and determine in a summary manner is *ousted*, and their hands are tied from interfering, though otherwise the facts are such that they might take cognizance of.[1] Thus in a case of assault or trespass this defence would deprive the magistrate of any power to act even if the defendant used more violence than was necessary to

[1] 24 & 25 Vict. c. 100, s. 46; 24 & 25 Vict. c. 97, s. 52.

assert his claim. It is necessary, however, that not only should the defendant really believe in his right, but that his belief should be a *reasonable belief*, and the magistrates must satisfy themselves that the claim is genuine, and not merely frivolous and obstructive.

Personal interest of magistrate.

A magistrate should refuse to act in any case where *personal interest* arises. When forming a Bench with one or more brother magistrates, the cessation of judicial interference by any one of them should not be shown, as is so often the case, by merely putting back the chair a few inches from the position in which it was before placed. It should be a matter of honour to avoid giving any ground for the belief that by his presence or otherwise he influenced others at arriving at a decision. As the late Lord Campbell, C.J., said: "*The proper course for a magistrate to pursue who has an interest is to retire and make it distinctly appear that he is no longer a member of the tribunal.*" Proceedings, however, would not be *ipso facto* void by reason of interest, for, if a magistrate continued to act and all parties knew of his interest and made no objection, his presence would not vitiate the proceedings. The interest that should restrain a magistrate from acting must be such as would be likely to operate to some appreciable extent in biassing the mind. When magistrates are members of public bodies, such as Municipal Corporations, Poor Law Boards, Improvement Commissions, &c., enabling statutes have given them the power to act in prosecutions ordered by such bodies notwithstanding any interest they may be supposed to have in the result. This power can only be acted upon,

Proceedings not ipso facto void.

however, where they take no personal part in the proceedings leading up to the prosecution.

A magistrate having once acted or adjudicated, although erroneously, cannot treat his act as a nullity and proceed to act afresh, nor can any other magistrate do this for him until the act or adjudication has been quashed by a higher Court. Once adjudicated cannot act afresh.

The safe rule for a magistrate to follow is to refuse to interfere in a case in which he has any doubt of his power to act. The applicant can then apply to the Court of Queen's Bench for a rule to shew cause why the magistrate should not act, and if he succeeds, and the magistrate acts in accordance with the order, the latter is freed from all responsibility. Safe rule when in doubt.

Magistrates, though not liable for mere errors of judgment, yet when guilty of gross acts of oppression or of exercising their powers for a vindictive or corrupt motive, are liable to be punished by indictment or by a criminal information in the Court of Queen's Bench. "*No magistrate ought to suffer for ignorance where the heart is right,*" said Lord Mansfield. This holds good so long as he acts "*within his jurisdiction.*" If, however, the act complained of was done by the magistrate *outside or in excess of his jurisdiction* he is liable to an action at law, even though acting bonâ fide. Personal liability of magistrates.

If one justice makes a conviction order, and another bonâ fide grants a distress warrant or commitment thereon, action must be against the one making the conviction.

No action can lie, apart from corruption, for the manner in which he has exercised any discretionary

Protection from vexatious actions.

power. In addition to this, by 11 & 12 Vict. c. 44, magistrates are themselves protected from vexatious actions whilst proceeding in the execution of their office.

Every action against a magistrate must be commenced within six months of the cause of action arising, and he is entitled to a month's notice of action.

The Court.

The court.

Until a few years ago there was nothing to prevent a magistrate from deciding in his library, or elsewhere, any case with which he was competent to deal, and any two or more magistrates could form themselves into a petty sessions at any place so long as it was within the district for which they were appointed.

Must be *open court.*

Now, and since the passing of the Summary Jurisdiction Act,[1] no case can be heard, tried, or determined by a magistrate, except when sitting in *open court.*

Open court is held at:—

Petty sessional court-house.

i. *The Petty sessional court-house,* i.e. a place at which the magistrates are accustomed to assemble for the purpose of holding sessions.

Occasional court-house.

ii. *The Occasional court-house,* e.g. a police station or some place *previously appointed* by the magistrates to be used for occasional purposes, and of which public notice has been given.

Occasional court.

An Occasional Court, whether formed by one, or two or more magistrates, cannot impose a greater term of

[1] 42 & 43 Vict. c. 49.

imprisonment or adjudge a larger sum than can one magistrate acting alone, viz. fourteen days imprisonment, or a fine of twenty shillings.

Court of Petty Sessions.

Courts of Petty Sessions are formed by the periodical and occasional meetings of the magistrates (acting within the district of their appointment), to try in a summary way, and without a jury, offences over which jurisdiction is given them. Each district into which a county is divided for magisterial business has its own petty sessional court, and it is in petty sessions that the magistrate exercises, for the most part, his judicial functions.

Special Sessions.

Magistrates further meet at what are termed *Special Sessions*. This is for the transaction of business required to be done at a special session by Act of Parliament, such as Licensing questions and the like special matters.[1] When a special session is to be held every acting magistrate must have notice of time and place, and business to be done, in order that he may have full opportunity of attending.

Quarter Sessions for the county.

In counties an extended jurisdiction is given to magistrates at *General Quarter Sessions* held four times a year in certain weeks appointed by Act of Parliament, viz. the first whole weeks after Oct. 11th, Dec. 28th, March 31st, and June 24th. These sessions may be adjourned from time to time and from place to place. The Court is formed by two or more magistrates qualified to act, who, besides hearing appeals from orders, &c., made by magistrates, and matters entrusted to the superintend-

[1] The major part of the administrative business of a county is now transferred to the county council (51 & 52 Vict. c. 41).

ence of justices at large, have, with a jury empanelled, an extensive criminal jurisdiction.

Borough Quarter Sessions.

In *Boroughs, Quarter Sessions* are, under the Municipal Corporation Act, holden before a Recorder, and the borough magistrates have no *locus standi* to adjudicate. In the absence of the Recorder, however, the Mayor may open, and adjourn, the sessions, but can do nothing further.

Power to order removal of certain persons out of court.

Notwithstanding that the court must be an open court, yet in *indecent cases* the magistrate may keep women and children from the precincts of the court. On the demand of either party the *witnesses* in any case may be ordered out of court, but disobedience to the order does not vitiate their evidence. If also, it is necessary to the maintenance of that order and decorum which should attach to a court of justice, a magistrate would be justified in directing the removal of any individual guilty of *unseemly conduct*.

Contempt of court.

Whether, going a step further, a magistrate is entitled *to commit a person for contempt* who insults him publicly when in the performance of his duties, is more doubtful. The better opinion is that he cannot proceed further than order the removal of the offender from the precincts of the court, or adjourn the proceedings altogether.

The Clerk.

The clerk.

In every county, district of a county, or borough, to which a separate commission of the peace is assigned, the magistrates may appoint some competent person to be their clerk. As it is on the advice of this gentleman the

magistrates have to rely when any question of technical difficulty arises, the legislature provides that he must be either a barrister-at-law of fourteen years' standing, or a solicitor, or a person who for a certain number of years has heretofore acted as an assistant clerk. His remuneration is now more generally a fixed salary in place of the court fees which formerly went into his pocket. His appointment or dismissal is in the hands of the magistrates of the court in which he is to act.

Duties of clerk.

Out of court the duties of his office are multifarious; in court his duties are well defined, but not so wide. In cases where the parties are not represented professionally he examines the witnesses, and in all matters of contention should take full notes of the evidence of both sides, so that, should it be desired by either party, a copy could be furnished in the event of further proceedings being taken.

Depositions.

Where graver matters of offence are under consideration, and the offender may be committed for trial before a jury, it is the imperative duty of the clerk to take in full in writing the evidence of every witness. If the case be sent for trial, the evidence so taken is read over to each witness, and signed by him or her as the case may be. (It is always advisable for this to be done as soon as it has been taken. At some courts it is the practice to defer reading over the deposition until the case is completed. This practice might become disastrous should the witness die in the interim, for the evidence could not be used at the trial, as sect. 17 of 11 & 12 Vict. c. 42 would not have been complied with.) The depositions, which after being signed by

the magistrate before whom they were taken, are placed in the hands of the Judge before whom the trial takes place.

With regard to this particular duty of a magistrate's clerk, it should be a not unimportant qualification to the office that the applicant writes a clear and legible hand. The importance of this both in the interests of the prisoner and the Crown cannot be over-estimated, for any divergence between the depositions and the evidence of the witness at the subsequent trial tends to damage his credibility.

Advice on points of law, *not further.*

Another duty of this officer is, when asked, to tender his advice to the magistrates on points of *legal* difficulty, *but not further*. Any pressure of opinion or voluntary advice on the general issue is to be resented by the magistrate in the interest of all parties. Whether it has arisen from the general want of knowledge of the bench both as to law and practice, or whether from the clerk having the stronger mind, it is nevertheless true that in many instances the latter becomes the arbiter of the issue.

A magistrate who wishes faithfully to discharge the responsibilities of his office will acquire that amount of knowledge which will fit him to exercise his discretionary powers without extraneous help.

CHAPTER II.

Preliminary Proceedings.

Preliminary proceedings.

No one is obliged by law to prosecute an offender; but, as Sir James Stephen says, any one who chooses to do so has ample facilities for the purpose. Any person,[1] and the rights of the police differ little from those of a private individual except that the former does not incur so great a responsibility, has a right to apprehend another on a reasonable suspicion of his having committed a felony, and in certain other cases of frequent occurrence. A magistrate, however, has no more power to initiate proceedings than has a private individual.

To bring offences of a less serious nature before the purview of a summary court, a *complaint* is made, or an *information* is laid, before some magistrate.

A complaint.

A person making a *complaint* asks for a civil remedy such as the enforcement of a payment of money, or for the defendant to be made to do, or be prevented from doing, a particular thing.

An information.

In an *information*, the informant asks for a conviction, or rather presents before

[1] A private person may apprehend another only when a felony *has been committed*, and he has reasonable grounds for believing that person committed it. A police constable, however, may arrest when he has reasonable grounds for *believing* that a felony has been committed, and that the person committed it.

the magistrate a statement, which if proved will be followed by imprisonment or the enforcement of a fine.

What they should contain.

The *complaint* or *information* should contain an exact description of the offence, and it should appear from such description that the offence is within the letter and spirit of the statute under which it is laid, the words of which should be followed as nearly as possible. It should be *dated* to show that it was brought within the prescribed time, and it must contain *one* matter of offence only, though two or more persons may be jointly charged. If it charges an offence against one statute the defendant cannot be convicted under another.

Variance as to time, place, and defect in substance or form does not make it bad, but may influence the magistrate when the hearing comes on if the defendant is misled thereby.

Need not be in writing.

Unless the particular statute require it, an *information* or *complaint* need not be in writing. Yet it is obviously safer and more satisfactory to all parties, that the magistrate should insist upon an *information* being set out in writing. Like the pleadings in civil causes and the indictments in the superior criminal courts, it is only an act of justice to the defendant to give him the means of ascertaining the precise nature and terms of the offence with which he is charged.

The magistrate in these summary matters has to combine the province of judge and jury, and as an act of precaution on his part should provide himself with a correct *charge* of the offence with which he is called upon to deal.

The *information* or *complaint* is generally drawn up

by the magistrate's clerk, but there is nothing to prevent the magistrate from drawing it up himself, though it is wiser on his part to leave it to be done by those more conversant with the rules and forms that have to be observed..

Informations laid without oath are merely required to be in writing and signed or acknowledged by the informant in the presence of the magistrate.

When on oath.

Whenever it is required by Act of Parliament, or whenever a warrant for the apprehension of the defendant is to be issued, it must be on the oath of the *informant* or some witness on his behalf—so, in the vast majority of cases, the oath must be administered.

Except in the case of infants, idiots, &c., the party aggrieved, his counsel, or attorney, should lay the information.

As to time.

If the particular statute under which the information is drawn does not fix a time, it must be laid within *six* calendar months from the time the grievance arose.[1]

The complaint made or the information having been properly laid, the defendant's appearance is procured by either a summons or a warrant.

Summons.

A *summons* is merely a notice in writing containing a concise statement of the charge, coupled with an order requiring the person therein named to appear at a certain time and place to answer the charge. It must bear the signature and seal of the magistrate issuing it, and must be served upon the defendant personally, or delivered to some person for him at his last or usual place of abode. Sufficient time should be allowed

[1] 11 & 12 Vict. c. 43, s. 11.

between the service of the summons and the hearing in order that the defendant may have the opportunity of obtaining legal advice and of preparing his defence.

Magistrates must guard against any appearance of haste in bringing a defendant before them. An improper haste may incur the censure of the High Court, and might be the subject of a criminal information.

In justice to the parties concerned, it is to be borne in mind that summary charges are frequently made by people under sudden excitement. In such cases, ample time for mature consideration may be given with advantage.

The time, however, allowed to the defendant is quite in the discretion of the magistrate, and, when they have adjudicated, the Court of Queen's Bench will refuse to upset their decision upon the ground that sufficient time was not allowed.

Objection to substance and form, when allowed.

No objection to the substance and form of a summons can be taken, unless it is such a defect as would be likely to mislead the defendant.

When issued.

A magistrate is not obliged to issue a summons in any case where the application is by law to be *ex parte*. It is the practice, however, to issue one whenever an order is applied for. A caution should be given to magistrates against signing *summonses in blank*, and leaving them with their clerks to issue at discretion. It is doubtful now whether this is often done, but it has been known to have been practised heretofore. It is a highly censurable proceeding, and one that may inadvertently render the magistrate liable to serious consequences.

Service of.

A *summons*, being a simple notice, may be served at

any place in the United Kingdom. Proof should always be required that the *summons* when not personally served has been delivered to some immediate attendant of the defendant in order to afford a reasonable presumption that it has come into his hands. What is deemed to be due service of the summons is for the decision of the magistrate, and generally service at the last known place of abode is sufficient. Before proceeding to extreme measures a magistrate would, no doubt, require stronger proof of its having reached the defendant. Proof of service.

A *warrant*, whilst containing a similar statement to the *summons*, is an order in writing to the person to whom it is addressed to apprehend the person therein named, and bring him before the magistrate to answer the charge. Warrant.

It must be under the hand and seal of the magistrate issuing it, shewing his jurisdiction, and can only be granted on a formal information on oath. Form of. When issued.

Generally when a default is made in the appearance of a defendant to a *summons* in any serious matter, there arises a probability of his absconding to evade punishment. A *warrant* for his apprehension is then issued to enforce his presence. In such a case, before the magistrate decides to issue the *warrant*, the matter of the complaint or information should be substantiated on oath, and he should further satisfy himself from the oath of the person who served the *summons* that it was served a reasonable time before the day named for the hearing.

Whether a *summons* or a *warrant* should issue in

the first instance depends upon the circumstances of the case. If the grievance take the form of a *complaint*, a *warrant* cannot be granted until a *summons* has been disobeyed. On an *information*, however, the magistrates have a discretion, and if it is decided to issue a *warrant immediately* great caution should be observed in drawing the information, for a defect or error in the proceedings that follow might enable the defendant thus taken into custody to maintain an action for false imprisonment. In any case a defect in the substance or form of a *warrant* likely to have misled the defendant should always be a ground for adjournment. The proper mode obviously is, in both instances, to issue a *summons* first, unless either there is a reasonable certainty that a *summons* will be disregarded, or, from the circumstances of the case, it would tend to defeat the ends of justice.

When out of jurisdiction.

If a defendant be out of the jurisdiction of the magistrate who issued the warrant, and it is *not* a case of *fresh pursuit*, the warrant must be *indorsed* (as we have previously intimated) by the magistrate of the county or district, in which he is sought to be apprehended. Before it is so indorsed, proof on oath must be given of the *bonâ fide* signature of the magistrate issuing it.

On the apprehension of the defendant under a *warrant* he may be carried before either the magistrate who issued it, or some other of the same county or district, or before a magistrate of the county or district where the offence appears by the warrant to have been committed.[1]

[1] See *ante*, p. 7.

A *warrant of apprehension* need not be made returnable at any particular time, but may remain in full force until executed. Remains in force.

When apprehended the defendant must be brought as soon as possible before a magistrate, and it has been held, that a constable or other person taking an offender elsewhere than to the nearest magistrate thereby loses the protection of the law.

In all cases on an arrest, it should be the duty of a magistrate to see that the case is brought on as quickly as possible. Undue delay brings a liability on the back of the magistrate apart from doing injustice to the defendant.

In addition to *warrants for apprehension* of offenders, *search warrants* are granted where there is evidence that a person has stolen goods in his possession, and *distress warrants*, where the defendant has failed to pay a fine, or penalty, with its concomitant costs. Search warrants. Distress warrants.

A *warrant* is not avoided by the death of the magistrate who issued it, or by his ceasing to hold office. Not avoided by death of magistrate.

CHAPTER III.

The Hearing.

The hearing. Appearance of parties.

When the case comes on for hearing, the complainant or defendant, or both, may not put in an appearance. Either party, in matters of complaint, may appear by their counsel or solicitor, and upon such appearance the personal absence of either the complainant or defendant cannot be tried as a default. If it be an indictable offence the presence of the defendant cannot be foregone, and in any case the magistrates may insist on the defendant's personal presence if they consider it necessary for the proper determination of the case.

When neither appear, the *complaint* or *information,* as the case may be, will be dismissed unless the circumstances of the case lead the magistrates to think a further investigation should take place. In that event, either a fresh summons will be issued or the hearing adjourned, giving notice of the time and date to the defendant, and issuing a witness summons for the complainant.

If the defendant only appears, the proceedings will be likewise dismissed unless the magistrates for some reason use their discretion, as they are entitled to do, and adjourn the hearing.

When only the complainant appears there are several courses open. If the absence of the defendant is caused *bonâ fide* and not for a sinister purpose, or if there be any doubt as to the defendant having had sufficient time, the magistrates may adjourn the hearing, and a *fresh summons* should be issued by the magistrate before whom the *complaint* was made. If no excuse be offered or suggested on the defendant's part, and if he is not charged with an indictable offence, the magistrates may proceed to hear the case *ex parte*, or, on the other hand, grant a *warrant* for his apprehension. If the proceedings are continued in defendant's absence, it is important that the evidence should be watched with more jealousy than would have been necessary had he been present. As, for instance, had there been any defect or irregularity in the summons, the defendant's appearance would have cured it, but his absence leaves him the opportunity of taking full advantage of it at a future stage of the proceedings.

Adjournments.

Should the defendant in appearing before the magistrates request on fair and reasonable grounds an adjournment in his own behalf (maybe on promise to pay any extra expense caused thereby), it is but consonant with justice that a liberal and wide discretion should be used to grant the adjournment rather than prejudice the defendant's case by undue haste.

An adjournment may be made before or during the hearing, and may be ordered by the magistrates in their discretion.

The time and place to which the hearing is adjourned

should be appointed at the time of the adjournment, and stated in the hearing of the parties or their representatives then present. In the mean time, the defendant may be allowed to go at large, or discharged upon entering into a recognizance with or without sureties, or be committed to safer custody.

Commencement of proceedings.

The parties necessary to the hearing being present, the proceedings are commenced by the *complaint* or *information* being stated or read over to the defendant. He is then called upon to show cause why an order should not be recorded against him—in other words, whether he is guilty or not guilty.

Claim to be tried by a jury.

If the offence is one (other than that of *assault*) in respect of the commission of which the offender is *liable* on conviction to be imprisoned for *more than three months*, the magistrates before going into the charge must inform the defendant that he has a right to be tried by a jury if he think fit.[1]

If he claim that right, the magistrates will proceed with the case as if it were an indictable offence. (This claim does not apply to a child, unless after enquiry it is found that the parent or guardian is in Court, when the right may be claimed by them on the child's behalf.)

Plea.

If the defendant admit his guilt, the bench may proceed at once to adjudicate. But, before receiving a plea of guilty, it is proper the magistrates should explain the legal quality of the offence, in order that the defendant may not admit a charge in ignorance of the requisites necessary to constitute the offence. Very often a person, after pleading guilty to the charge, adds

[1] 42 & 43 Vict. c. 49, s. 17.

a statement which, if true, may amount to a partial or complete justification. Under such circumstances it is always better to take the plea of *not guilty*, and let the case proceed on its merits.

Under any circumstance, whatever the plea, the degrees of guilt are so various that the evidence is generally proceeded with to such a point as to satisfy the mind of the magistrate as to the degree of culpability of the offender.

Course of proceedings.

If the case be contested it is the practice for the complainant or his legal representatives to state his case shortly before calling his evidence, the defendant taking any objection he may have to the complaint, information, summons or warrant *before pleading*. After the examination, and re-examination following the cross-examination by the defendant of the witnesses for the complainant, the defendant may state his case, then call his witnesses, who in their turn submit to the cross-examination of the complainant.

The complainant is then allowed to call witnesses to rebut the defendant's case, the examination being taken as before, but no further observations on the evidence are allowed to either party.

Witnesses.

Witnesses.

In order that all the facts relevant to the innocence or guilt of an offender may be ascertained, a magistrate has powers of compelling the attendance of a necessary but unwilling witness (residing in his jurisdiction) by the issue of a *summons*. And if he or she refuse to obey the *summons* a *warrant* may be granted. Before the

Attendance of.

latter course is pursued, it must be proved *on oath* to the magistrate that the *summons* has been served, and a reasonable sum for costs and expenses, paid or tendered.

A witness may attend, however, and yet refuse, without *lawful excuse* (this would excuse a witness who had not been given his expenses, but *expenses* would not include a sum for loss of time), to give evidence. In that event, and if the proceedings be under Jervis' Act,[1] he or she may be imprisoned for contempt, but not for a longer term than seven days.

Except for the provisions of the particular statute under which proceedings are taken, a magistrate has no general power of compelling obedience.

Competent and incompetent. Age.

A witness may be incompetent to give evidence from the want of understanding, as in the case of a child or lunatic. A child may be a witness, provided he or she appear sufficiently to understand the nature and moral obligation of an oath, or where, in the case of rape or attempted rape upon a child under the age of thirteen, the girl in respect of whom the offence is charged, though not understanding the nature of an oath, may be called as a witness if in the opinion of the magistrate she is of sufficient understanding to justify its reception (see *post*, "*Corroboration*").

Religion.

Religious belief or the want of it does not render a person incompetent (see *post*, "*Oaths*").

Marriage ties.

At Common Law, *the wife or husband* of the accused person was an incompetent witness. Recent legislation, however, has introduced various exceptions to this rule, and the incompetency is removed :—

[1] 11 & 12 Vict. c. 43.

I. In cases of personal injury (*e.g.* assault) by husband or wife, and *vice versâ*.

II. In criminal assaults on women and children.[1]

III. In proceedings taken under the Married Women's Property Act, 1882.[2]

IV. In certain offences with regard to conspiracy and protection of property,[3] explosive substances,[4] merchant shipping,[5] and army discipline.[6]

V. In matters arising out of a civil right only.

VI. In cases under the Prevention of Cruelty to, and Protection of, Children Act, 1889.[7]

The *accused* also may, though he is not compelled to, be a witness on his own behalf in any of the above instances, II., III., IV., V., and VI. The accused.

Again, though competent, a witness may claim that his evidence is *privileged*. Thus he could not be called upon to say anything that might render himself criminally liable. Legal advisers are protected in their professional communications, and communications between husband and wife are privileged.

Oaths.

For some years past there has been a difficulty with regard to receiving the evidence of a witness refusing to take the oath. By the Common Law no particular The oath.

[1] 48 & 49 Vict. c. 69.
[2] 45 & 46 Vict. c. 75, s. 12.
[3] 38 & 39 Vict. c. 8.
[4] 46 & 47 Vict. c. 3.
[5] 38 & 39 Vict. c. 88, s. 4.
[6] 42 & 43 Vict. c. 33, s. 149.
[7] 52 & 53 Vict. c. 44, s. 7.

form of oath was required so long as the one taken was binding on the conscience of the witness. There were many persons, however, the numbers constantly increasing, who objected to the taking of any oath. Provision was therefore made to allow those to affirm who had a *religious objection* to an oath. But this did not go far enough. The position of those having no religious belief was defined in the words of the late Lord Westbury, "*That such infidels—if any there should be—who either do not believe in a God, or, if they do, do not think that He will either reward or punish them in this world or the next, cannot be witnesses in any case, or under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation to them.*" This narrow-minded view of the credibility of evidence was thrown aside so far as witnesses in a court of justice were concerned by 32 & 33 Vict. c. 68, s. 4. Now by 51 & 52 Vict. c. 46, every person objecting to be sworn, upon stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, may make an affirmation.

The law even in this state is exceedingly unsatisfactory, for to compel a person to say that he is an infidel is to attach to his evidence the prejudice in the minds of the bigoted that an unbeliever can have no conscience.

The witnesses should be sworn or have the affirmation taken in the presence of the defendant, and in the absence of legal representatives the examination is conducted by the magistrate's clerk.

Credibility of Witnesses.

The credibility of a witness.

Under this head undoubtedly come the more difficult and yet the most important duties appertaining to the office of magistrate. As a judge *and* jury combined, he must sift the character, read the thoughts, and divine the motive which impels a man to speak to the truth or falsity of the matter the magistrate is called upon to adjudicate.

It is said evidence rests upon our faith in human testimony *as sanctioned by experience.*

Experience teaches us that the credibility of a statement is to be judged by the means the informant has of gaining correct information, his interest in concealing the truth or publishing falsehood, and the coincidence of other testimony.

The honesty of a man's purpose in the majority of instances may be judged by his demeanour as a witness. Is the narrator simple and natural in his utterance, with a readiness of detail as well in one part of the statement as another, shewing an evident disregard of either the facility or difficulty of corroboration, or is he laboured and cautious, remembering one fact, forgetting others, all the while affecting indifference whilst protesting his honesty? It is thus that a magistrate must bring to bear on each individual witness his power of discernment.

Credibility of children.

There are certain classes of witnesses more or less to be relied upon. Thus *children*, from the innocence which must accompany their tender years, are generally regarded as incapable of sustaining an untruth. *Women*,

Credibility of women.

from their innate love of the marvellous (quoting from a learned writer on evidence), are more often prone to exaggeration.

Credibility of constable.

To determine the weight to be attached to official evidence needs great discrimination. The *constable* is the official with whom the magistrate has for the most part to deal. Speaking of them *as a class*, they are men of honesty and good feeling, for it is by their good character that they have obtained the post. Officialism, however, is the petrifier of the human heart, and the constant exercise of a constable's professional duties begets a callousness and a want of regard for the rights and liberties of the individual. To quote that able and learned authority 'Taylor on Evidence': "Their testimony against a prisoner should be watched with care: not because they intentionally pervert the truth, but because their professional zeal, fed as it is by an habitual intercourse with the vicious, and by the frequent contemplation of human nature in its most revolting form, almost necessarily leads them to ascribe actions to the worst motives, and to give a colouring of guilt to facts and conversations, which are perhaps in themselves consistent with perfect rectitude. *That all men are guilty until they are proved innocent is naturally the creed of the police.*"

Without giving a constable more than average common sense, he becomes from intuitive conception, or as it were from self-preservation, a professional expert in the matter of evidence. He has been at Quarter Sessions and attended as a witness in Assize Courts, he has been examined and cross-examined by judges and

counsel, and the result is that he soon finds out all those lesser links which together complete the chain of evidence.

What a power for evil may thus be put in the hands of ignorant or vicious men.

An active, intelligent, and well-known detective on being interviewed on this subject said, "From my experience I am firmly convinced that nine out of ten policemen go into the box with the determination to convict the accused." The statement is startling, yet there is good ground for the belief. In the first place, the constable takes it for granted that he is dealing with a *guilty person*, and in the next, that to fail in sustaining a charge which has once been brought would put him in an unfavourable position with his superior officer.

To again quote 'Taylor on Evidence': "Presuming him" (the accused) "guilty from the first, they" (the constables) "are apt to consider his acquittal as a tacit reflection on their discrimination or skill, and, with something like the feeling of a keen sportsman, they determine if possible to bag their game. Innocent actions may thus be misinterpreted, innocent words misunderstood; and, as men readily believe what they anxiously desire, facts the most harmless may be construed into strong confirmation of preconceived opinions."

Undoubtedly the constable regards the exercise of his professional acumen as beneficent to society by freeing it from the presence of the guilty.

In the majority of Petty Sessional cases the constable is the principal witness, if not the only one. It

is all-important, then, that the magistrate shall understand that only the amount of weight must be attached to such a witness as would be attached to one who is skilled in the performance and interested in the result. One further remark. By his constant attendance before one particular bench of magistrates, the sagacious constable becomes acquainted with the various idiosyncrasies in the character of those that occupy it. Of this he takes advantage, and in many courts of summary jurisdiction he is regarded as a witness of more than ordinary veracity. In such a case one can understand why the feeling exists in the minds of the lower classes that their fate depends, *apart from any charge*, upon the good or bad word of the police officer.

Where personal interest intervenes.

Where a witness has a personal interest in a charge being sustained, it undoubtedly lessens the value to be attached to his evidence. Thus a mother has a personal interest in proving the parentage of her bastard child, and it is oftentimes to the benefit of a gamekeeper that the person he charges with poaching should be convicted.

It is sometimes found, moreover, that criminal charges are preferred by persons for the purpose of obtaining payment of a debt (in certain charges of obtaining money by false pretences), or a charge has been held over the head of a defendant for the purpose of extorting money. Of course, if there be a criminal offence, the penalties of the law must ensue, but the evidence of such a witness is overshadowed by the strongest personal interest.

Accomplices.

Where two or more persons are together charged with a crime, the one cannot be a witness against the

other unless the former has already stood his trial or pleaded guilty.[1] It may be then taken for what it is worth. The evidence of an accomplice, however, is evidence upon which very little reliance should be placed unless it be corroborated in various particulars by other witnesses.

Under this head it is well to mention a practice, so strongly reprehended by the judges of the Superior Courts, through which police officials, under the mask of a confederate, induce a person, of whom they have a suspicion, *to commit* the suspected crime or offence. To give an illustration. A case lately came before a county bench in which a woman was charged with indecent behaviour in a public thoroughfare. The evidence was that, she, having been suspected of the offence, an official in plain clothes was set to watch. He saw the woman, and got into conversation with her. She was ultimately offered a sum of money to allow certain familiarities to take place. Upon consenting, she was taken into custody, and ultimately *convicted on the unsupported evidence of the man causing her to commit the offence.* Surely there can be no excuse for suborning justice in this way. The worse the character of an individual, the more reason to keep temptation from his or her path.

If an offence is sought to be proved by these means, the witness must be regarded as an actual accomplice, and his evidence must be treated accordingly. This criticism must not be taken to include those cases where,

[1] What one defendant has said in the presence and hearing of the other may be given in evidence.

to find out the perpetrator of a crime *already committed*, various methods are legitimately used to delude the criminal in order to gain sufficient evidence to convict.

Where the credit of a witness is contested in cross-examination, his answers may be contradicted by independent evidence if the question relate to *relevant* facts, not otherwise. In other words, if the answer of the witness is a matter upon which the other side would be allowed to give evidence, then it is a matter upon which he may be contradicted.

Confessions.

Confessions.

Confessions may, or may not, be allowed as evidence against the defendant, it depends entirely as to the *freedom* with which they were made.

A free and voluntary confession made by a defendant, whether in the course of conversation with private individuals, or police officials, or magistrates, is admissible against him.

The gist of the whole question is—was it made *perfectly voluntarily*, and not obtained or improperly extorted by means of promises or threats?

It must be proved affirmatively on the *part of the prosecution* that the confession was made without the promise of any favour, and without menaces or undue terror. Whilst it has been held that the inducement which has led to the confession must be made by some person having authority in the mind of the prisoner, yet these cases have gone a great length to show that the *least* promise of favour is sufficient to make it bad in evidence, *e.g.* "Tell me where the things are and I will

be favourable to you." "You had better tell me all you know." "I should be obliged to you if you would tell me what you know about it; if you will not, of course we can do nothing." "It might be better for you to tell the truth and not to lie," &c.[1] An inducement held out to an accused person to confess to the charge in general will probably tend to make his confession an untrue one. If, however, it cannot be construed in that light it is admissible, *e.g.* a prisoner asked a witness whether he had better not confess, and the witness replied he might say what he had to say to him, and it should go no further; the statement thereupon made by the prisoner was held admissible. The inducement must refer to some temporal benefit, for hopes which have reference to a future state merely could not, so far as the principle here involved, be held out improperly.

Where a prisoner is willing to make a statement, it is the duty of a magistrate to receive it, but he must first caution him that the statement may be used against him. The mode of doing this is prescribed in terms by statute.

It is to be observed that a man's confession can only be evidence against himself, and has no effect as regards his accomplices (see *ante*, p. 35).

Corroboration.

Corroboration.

It was a Mosaic injunction that two or more credible witnesses should be required to prove any charge, and, if there should be a marked discrepancy between the

[1] See Roscoe's 'Digest of Evidence,' 10th ed., p. 40, and the cases there quoted.

versions so given, the effect of the evidence of the one was valueless, having regard to different facts alleged by the other; and so the proof of the offence would fail. The English Common Law, however, has not followed the advice of the Old Testament, and there is nothing in our law, except when a statute has expressly provided for two witnesses, as in perjury, or bastardy, &c., to prevent a conviction following the unsupported word even of an accomplice.

No jury, however, would convict (and this is always the test that should be applied) if there was entire absence of corroboration—

> "For when we risk no contradiction
> It prompts the tongue to deal in fiction."
>
> —*Gay's Fables.*

The *amount of corroboration* required is left to the magistrate, as it would be to the jury whose place he takes. It may be evidenced by the conduct of the person implicated and the circumstances that surround the case. If the witness be an accomplice, or being otherwise worthy of belief have official or personal interest in the result, the corroboration should be strong and conclusive; if no such interest exist, then the test would not be so severe.

It is to be observed that, where a child is examined *without being sworn* under the Criminal Law Amendment Act,[1] the case *must* be supported by further evidence.

There is a rule laid down as to corroboration, which should apply without exception, namely, that if the evidence of a person making a charge *can be supported*

[1] 48 & 49 Vict. c. 69.

by a further witness, and that witness is not produced and no reasonable excuse offered for his absence, the charge must fail.

Evidence in Certain Cases.

Evidence in particular cases.

Before setting out the rules that should guide magistrates in receiving evidence, there are certain cases which call for special remark.

Bastardy.

Bastardy.

A single woman, widows, or married women living apart from their husbands, wishing to affiliate a bastard child must apply for a summons either when pregnant or *within twelve months after delivery*,[1] unless—

i. The man has ceased to reside in England within twelve months of the birth, in which case she must make it within twelve months of his return; or

ii. The man has paid money for the maintenance of the child within the twelve months after birth, in which case she can make her application at any time.

The woman may apply to any Court where she happens to be *bonâ fide* residing, and it does not matter where the child was begotten, so long as it was born in England, or on an English ship.

The jurisdiction of the magistrates is not ousted by the father having paid down a lump sum in satisfaction of all claims upon him, though such a circumstance would, of course, have the greatest weight with them in considering their decision.[2]

The mother must be a witness.

The woman herself must be a witness, and, if she should die before the hearing, no order can be

[1] 35 & 36 Vict. c. 65. [2] *Follet* v. *Koetzon*, 29 L. J. M. C. 128.

made.[1] It was the undoubted intention of the legislature, that having regard to the peculiar nature of the enquiry, no satisfactory conclusion could be arrived at without the examination and cross-examination of the woman on oath.

Corroboration necessary.

The evidence of the mother *must be corroborated* in some *material particular* by further and separate testimony.[2] Facts long antecedent to the suggested intercourse, *e.g.* excessive familiarities, are evidence, and, when spoken to, are material corroboration.[3]

Admission by defendant, or words amounting to admission, would be material corroboration.

It is important at the hearing to follow the cross-examination. The woman is liable to be cross-examined as to sexual intercourse with other men, and care must be taken to see to what it tends; if it is merely for the purpose of impugning her credit, she cannot be contradicted by other evidence, but, if it is with the object of showing that the person named was really the father, she may be.[4]

Non-access of husband.

If the complainant be a married woman separated from her husband, his non-access to her must be proved by other evidence than her own, for that purpose she is not a competent witness.

Period of gestation.

The period of gestation, an important factor in the case, is ordinarily 280 days, yet a large number of children are born after a seven months' impregnation; on the other hand, the delivery may be protracted for as long as a month after the usual period.

Where there is any striking deviation from the

[1] *Reg.* v. *Armitage*, L. R. 7 Q. B. 773. [2] 35 & 36 Vict. c. 65.
[3] *Cole* v. *Manning*, 2 Q. B. D. 611.
[4] *Garbutt* v. *Simpson*, 32 L. J. M. C. 186.

ordinary time, however, it is well that the magistrate should have the benefit of medical evidence.

Defendant competent witness.

The defendant is a competent witness, and may be called even on behalf of the complainant.

The question of the defendant going into the witness box should have great influence on the mind of the magistrate. If he be willing to take the oath, stand the brunt of cross-examination, and render himself liable to a prosecution for perjury should he lie, very strong corroboration of the woman's story would be required before a conviction should ensue. On the other hand, though the defendant's refusal to submit himself for examination would not of itself be sufficient corroboration of the truth of complainant's story, yet with just so much more as to satisfy the statute the magistrate would feel bound to make the order.

Pecuniary interest of complainant.

Great care must be taken in sifting the complainant's evidence, for apart from the great pecuniary interest in getting an order made, if she has had connection with more than one man the probability is she will try to father the child on the least acceptable swain, especially if he be provided with larger means than the more favoured one.

There is a great doubt in many minds as to the expediency of the magistrates trying to induce (as is often done) the man to marry the girl. Married life begun under such auspices is hardly likely to be a happy one.

If on full investigation an order is made, it is for the *maintenance and education* of the child, and *these words* are *absolutely necessary* to the order.[1]

[1] *Reg.* v. *Padbury*, 5 Q. B. D. 126.

Desertion.

Desertion.

When a wife has been deserted by her husband without reasonable cause, she may come to the magistrate to ask for an order to protect *her earnings and property acquired since the desertion.* She must *prove* the marriage, the unjustifiable desertion, and that she has property requiring protection.

A still more important power is placed in the hands of the magistrates by the Married Women (Maintenance in case of Desertion) Act, 1886,[1] by means of which two magistrates in petty sessions, if satisfied that a husband, on being summoned by his wife for desertion is able wholly or in part to maintain his wife, and has wilfully refused or neglected so to do, and has deserted her, may order a weekly sum of money (not exceeding two pounds) to be paid by him to his wife. The amount must be in accordance with the earnings of the husband and any means the wife may have for her support. Upon proof at a subsequent time by husband or wife that his or her means have altered in amount, the original order may be varied. Adultery, unless condoned, is a bar to the obtaining of an order under this Act. The payment of the money is enforced as under an order of affiliation.

Education.

Education.

The Elementary Education Acts[2] require children between the ages of five and fourteen (unless before that time they reach a certain standard) to attend Board Schools.

[1] 49 & 50 Vict. c. 52. [2] 33 & 34 Vict. c. 75; 39 & 40 Vict. c. 79.

Their parents may be fined for their non-attendance unless they have a reasonable excuse to offer. A reasonable excuse would be any of the following :—

1. The child is under efficient education elsewhere.

2. It was prevented by sickness or other unavoidable cause.

3. There is no school within two miles.

4. The child was sent, but played truant.

Poverty is no defence ; therefore to say the child was sent, but not having money to pay the fees it was not admitted, is not a lawful excuse. Though it is imperative that they should attend *with the fees*, it should have great weight with a magistrate dealing with a case when poverty is the only offence. Now, however, the exaction of fees from the poor for the education of their children, which has hitherto been the cause of so much hardship and irritation, is now reduced to a minimum by the Elementary Education Act, 1891 (54 & 55 Vict. c. 56) practically making education free.

Where a child is habitually neglected by parents, or found habitually wandering, or in consort with vagabonds, prostitutes, thieves, &c., the local authority, after notice to parents, may complain to the magistrates, who thereupon may make an attendance order on some certified efficient school which the parent may select, or, if he do not select, which the Court may order.

Disobedience for the first time to an attendance order entails a fine on the parent unless he shews that he has used every effort to cause the child's attendance.

Where notwithstanding the parents' endeavours the child has not attended, or where there has been non-compliance with the order for a second time, the child may be ordered to be sent to a certified Day Industrial school, or, if there be no such school suitable, to a certified Industrial school.

A child cannot be employed in a business when under ten years of age, but between the age of ten and twelve years it may go to work, if there be no school within two miles, or after school hours, or in holiday time.

Licensing Laws.

Licensing Laws.

The law with regard to the sale of intoxicating liquors has been greatly criticised of late, and we seem to be on the eve of great changes in the present system. Whether the licensing power will remain in the hands of the magistrates, or be transferred to the county councils, is for a future Act to determine.

At present, magistrates have still vested in them *an absolute discretion* either to grant or refuse any application for a licence, and on recent judicial authority this discretion is as unqualified on an application for a renewal as it is for a new licence.[1]

The magistrates are therefore entitled to enquire into the character and wants of the neighbourhood, and to refuse even a renewal on those grounds alone.

Poor Rates.

Poor rates.

A person who fails to pay his poor rates may be summoned before the magistrates, and a *distress warrant*

[1] *Sharpe* v. *Wakefield*, L. R. App. Cas. (1891), 173.

issued against him. If no goods can be found, he may be imprisoned.

In issuing a *distress warrant* the magistrates cannot enquire into the validity of a rate *good on the face of it*, unless the person against whom it is to be issued alleges that he has no rateable property at all within the parish.[1]

Newspaper Libels.

Newspaper libels.

In a charge of libel against *a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper*, for a libel published therein, the magistrate *may receive evidence* as to the publication being made for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate and without malice, and generally any matter which might be given in evidence on trial or indictment. The magistrate, if then of opinion that no jury would convict, would dismiss the charge. If, moreover, it is thought to be of a trivial character, and the defendant consents, the magistrate may deal with it summarily.[2]

The Act setting out the above, however, does *not* apply to the actual composer of the libel or to persons concerned in a libel which has not appeared in a newspaper; these, therefore, would be bound by the ordinary procedure in a summary court in libel which *debars* a magistrate from examining into the *truth of a libel* as a possible ground to decline to commit the defendant for trial.

[1] *Ex parte May*, 31 L. J. M. C. 161. [2] 44 & 45 Vict. c. 60, s. 3.

Adulteration.

Adulteration.

In charges of adulteration action must be taken within twenty-eight days if the articles are perishable, otherwise, within six months. The *certificate* of the analyst is *sufficient evidence*, but the defendant may compel the presence of the analyst in person for the purpose of cross-examination.[1]

Defendant and wife are competent witnesses, though it amounts to a criminal offence. If the analyst's conclusions are doubted, the magistrates may have the suspected article analysed by the chemical officers of Somerset House. But it seems doubtful whether any evidence (apart from the cross-examination of the analyst) can be given to contradict the certificate.

Cruelty to Animals.

Cruelty to animals.

Proceedings must be instituted within a month.[2] In *vivisection cases* the defendant can claim to go before a jury if he please. *Search warrants* may be granted by a justice on information on oath that experiments contrary to the Act are being conducted.[3]

Evidence in General.

Evidence in general.

Touching the question of evidence generally, the rules that guide the magistrates may be collected in a few leading maxims.

Burden of proof changes.

In the first place, the *burden of proof lies on the prosecutor* or complainant. This, however, may shift in the course of the case on to the defendant: as for

[1] 38 & 39 Vict. c. 63. [2] 12 & 13 Vict. c. 92; 17 & 18 Vict. c. 60.
[3] 39 & 40 Vict. c. 77.

instance, where a theft has been committed and the property is shown to have been in the possession of the defendant immediately after the theft, it becomes the duty of the defendant to show that he came by it honestly.

Confined to point at issue.

Then, evidence must be *confined to the point at issue,* and no facts antecedent to the charge can be brought to prejudice the case. Where, nevertheless, a question of intention arises, the defendant's conduct after the offence may be given in evidence if it be such as to raise the inference that he committed it.

Hearsay evidence.

The *best evidence must be given* or its absence explained. Thus, matters of *hearsay* are *not* competent evidence. Any conversation, however, taking place *in the presence and hearing* of the person charged may be given, and so may a statement made by a person in a dying state who makes it in that belief.

No one can be called upon to criminate himself, and therefore no questions can be put to the defendant unless he be a competent witness in the case, and is sworn and tenders himself as a witness.

Benefit of the doubt.

The language of the law must *never be strained to make an offence,* and wherever two constructions are admissible that which is most favourable to the defendant must invariably be preferred. It is the duty of the magistrate to keep the keenest scrutiny in the enquiry in order to give the defendant the benefit of any failure or defect in even the technical evidence.

Having the functions of both judge and jury, the magistrate must be careful *as a jury* to observe the

demeanour and conduct of the witness in the box, and *as a judge* to deal with the legal effect of the actual words spoken.

The question for the magistrate in all cases *is*, has the defendant been proved, by proper and sufficient evidence, to be guilty, *not* whether he believes him to be guilty in his own mind?

Acting as a jury, the magistrate is bound to act according to the oath that they have to take . . . . "to truly try, &c. . . . . *according to the evidence.*"

Prejudice.

To decide whether the evidence has been sufficient to render the accused liable to the penalties of the offence is oftentimes a difficult matter, and one that requires the deliberation of a mind free from the prejudices that so often surround the man who thirteen days out of the fourteen is engaged in commercial, agricultural, or theological pursuits. What chance would a man out on strike, charged with intimidating a fellow-workman, have, if the presiding magistrate be a manufacturer suffering or having suffered from a strike by his own *employés*—the supposed poacher, what chance from the game preserver—the village scoffer, from the clergyman—unless the mind of the judge be free from the prejudice of his daily associations? In all these cases the accused may be a very wicked person, an old offender, or he may even be guilty of the offence alleged; yet, unless there be confidence in the public mind that he will meet with an even-handed justice, his judges will be held up to scorn, and the offender made into a martyr.

Before giving a decision a magistrate will ask himself—

Is there sufficient evidence under the particular statute under which the complaint is made? What is the character, demeanour and interest, personal or official, of each particular witness? What as to the independent probability or improbability of the case? Is there corroboration, or could there be corroboration of complainant's story? These are all most important points to bear in mind.

No question of previous conviction.

There must be brought to bear *no question of previous offence* in order to convince a doubtful mind. This point is exceedingly important, and cannot be impressed on the mind too strongly. In a case reported not so very long ago, the only evidence offered was that of a policeman, who said he found the defendant at three o'clock in the morning in a lane with a gun on his shoulder. His boots were wet, but nothing was found upon him. In deciding the case the presiding magistrate is reported to have said, "*Taking the previous convictions into consideration,* I have no doubt that you have been poaching." And so he was convicted. Comment is needless.

To sum up in the words of Sir James Stephen[1]:—"The evidence upon which a man is convicted must lead to prove the whole, or a part of the very fact of which he is accused, or some other fact specifically connected with it. It must consist either of a material thing produced bodily before the Court, or of the statements of witnesses of what they have themselves perceived of their own senses. If the point be proved in a confession made by the prisoner, it must be shown that

[1] See Stephen's 'General View of the Criminal Law of England.'

he made it quite freely without the shadow of a threat or an inducement. This evidence must be given on oath or affirmation, and the credit of persons may be tried by means contrived so as to test their accuracy. It must be elicited by questions that do not suggest the answer, and may be tested and counter-checked by the most specific collateral enquiry on every branch of it."

One further word of caution: if the result be that the evidence has not brought home the charge to the accused, by all that is just and generous, let no remarks, whether by way of reprimand, or suspicion, or otherwise, be added to the decision of the bench. "The charge is dismissed, and do not do it again." "There is no proof against you now, but the next time you do it you will be punished severely," and so on. In the first place, by so doing the magistrate might render himself liable to an action for slander; in the second, it is exceeding his duty; and lastly, it is unjust, for it may have a highly injurious effect on the future of the defendant.

CHAPTER IV.

Indictable Offences.

Originally every offence was indictable at the suit of the Crown. *Nullus liber homo capiatur vel imprisonetur nec super eum ibimus nisi per legale judicium parium suorum vel per legem terræ.* Indictable offences.

With the increase of population, and the constant and continuing addition of rules and regulations for the government of communities, it was found impossible to submit petty offences to all the legal forms, technicalities, and delays that might follow the commission of a serious crime.

In this manner the jurisdiction of the magistrate has been extended from time to time to meet the increased demands on the Executive.

Thus far having set out the procedure where the preliminary enquiry *and* the judicial determination rests with the magistrates, we proceed to note now any divergence in the proceedings where they act only *ministerially, i.e.*, where it is the duty of the magistrate not to try the accused, but only to say whether *he ought to be tried.* Magistrates act ministerially.

The preliminary proceedings are much the same as in a case for summary jurisdiction. The *information,*

however, may contain *several distinct charges*, and to put aside the question of liability to abscond, the warrant is nearly always issued in the first instance, and may be issued and executed on Sundays. The proceedings being merely ministerial, *one* magistrate is competent to take the depositions, but the Court must be an *open Court*, and the assistance of an advocate allowed to either party though it is doubtful whether this can be claimed *as of right*.

Proceedings in presence of accused.

The proceedings must be conducted *in the presence of the accused*, and he has full liberty to cross-examine the witnesses. Their depositions are taken down in writing to be afterwards read over and signed by them and the magistrates (see *ante*, p. 15).

When all the evidence for the prosecution has been thus received, the Court will consider whether there is a *primâ facie* case made out. If *nay*, the accused will be discharged; if *yea*, the depositions will be read over to the accused, and after a caution (the words are as follows: "*Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial*"), any statement made by him is put down in writing and added to the depositions. If the accused desire to call any witnesses, they must be heard and dealt with in like manner to the witnesses for the prosecution. On this latter point, some magistrates have thought they had a discretion, and have in certain instances given the prisoner *no opportunity* of calling evidence for his

Accused may call witnesses.

defence. This is a great mistake, and may be the means of causing grave injustice. There is no discretionary power in this matter, and if evidence for the defence be tendered and not received, the magistrate places himself under a serious liability to the defendant and a probability of being struck from the commission.[1] In indictable offences, witnesses for the prosecution only can be compelled by the magistrate to attend; and that only (except in the case of a London police magistrate) where the witness is in his (the magistrate's) jurisdiction.

On a witness appearing and refusing without good ground to be examined, he may be committed for seven days, unless in the meantime he offers to give evidence (see *ante*, p.*28).

The Court may at any time during the enquiry remand the defendant for not longer than *eight* days (see *post*, p. 56). When it is only for a time not exceeding *three* days, it may be a *verbal order* to the constable in charge. In other cases, it must be by warrant under the hand and seal of the magistrate.

Duty as to commitment.

The duty of magistrates as to commitment is regulated by statute. They are to commit if in their opinion the evidence is sufficient to put the accused party on his trial for an indictable offence, or if the evidence raise a strong or probable presumption of the guilt of such accused party; in other words, if the

[1] Severe comment on the conduct of the magistrates was made by Lord Coleridge, C.J., in a recent case where witnesses for the defendant were refused a hearing.

evidence be such that it might convict the defendant *in the minds of twelve reasonable men.*

The prosecutor and witnesses on both sides must be bound over and enter into a recognizance to appear and give evidence at the trial, and a witness refusing so to be bound may be committed to prison up to the time of the trial. Though it is obviously the proper course that a charge should be preliminarily enquired into before a magistrate, yet a prosecutor may, *except* in cases of *perjury, subornation of perjury, conspiracy, obtaining goods* or *money* by *false pretences, indecent assault,* or *keeping a gambling* or *disorderly house,* or any *misdemeanour* under Part II. of the Debtors' Act, 1869,[1] go straight to the grand jury and ask them to find a true bill against the accused.[2]

Prosecutor may go straight to jury. Exceptions.

With regard to the exceptions set out above a preliminary enquiry must first take place before a magistrate, but if he does not feel from the evidence justified in committing the accused, he may be required to take the prosecutor's recognizance to prosecute his complaint, and the trial will subsequently take place as if the committal were made in the ordinary course.

There are certain indictable offences, however, with which magistrates are empowered to deal summarily.[3]

May deal summarily in certain instances.

Thus *children,* apparently between the ages of *seven* and *twelve,* charged with an indictable offence other than murder or manslaughter may, with the consent (if they be present) of the parent or guardian, be dealt with summarily. (It must be remembered that a child

Children.

[1] 32 & 33 Vict. c. 62. [2] 22 & 23 Vict. c. 17.
[3] 42 & 43 Vict. c. 49.

under seven years of age is by law absolutely incapable of committing a crime.)

In like manner also *young persons* between the ages of *twelve* and *sixteen*, consenting thereto and charged with offences such as *simple larceny, receiving stolen goods, embezzlement*, &c. Young persons.

Adults, with their consent, and charged with the same offences as young persons between the ages of twelve and sixteen, but where the amount involved is under forty shillings, and *adults pleading guilty*, and charged as above, but *without limit* as to amount, may be dealt with in like manner. Adults.

If, however, the person charged has been previously convicted so as to render him liable to penal servitude on a second conviction, he must, *the above notwithstanding*, be committed for trial. Previous conviction prevents a summary dealing.

To deal *summarily* with an *indictable offence*, there must be *two* or *more* magistrates sitting in a petty sessional court on a day appointed for hearing indictable offences.

The powers given to a magistrate to deal in a summary manner with such indictable offences as have been above mentioned, should be exercised of course when they deem the punishment they are enabled to inflict of sufficient severity in relation to the offence. They are *not bound* to exercise their jurisdiction; and if they think the ends of justice would be better served they should commit for trial.

On the other hand, as we have already intimated, where the case is one for summary dealing (other than an assault), and one for which the defendant if found Claim to go before a jury.

guilty can be imprisoned for more than three months, he can claim a trial by jury. The Court must inform the defendant of this right *prior* to receiving the evidence, and the right must be claimed *before* the evidence is gone into. Until the Court obtain the power to deal summarily with the case, the procedure must be as if the accused would be committed for trial. Where the consent of the accused is necessary, and before it is given or acted on, the magistrates should carefully explain the difference between procedure in a summary trial and trial by jury.

Remands.

Remands.

Under sec. 21 of 11 & 12 Vict. c. 42, magistrates may, in their discretion, *remand* the accused for any period not exceeding *eight days*, and at the expiration of that time *may again remand* him, and so on from time to time as long as a *remand* may be considered necessary.

This power may be an instrument of great injustice, and *no remand* should be made, except for the shortest periods, unless it be supported by good evidence.

Where a magistrate, in a case finally coming before Mr. Justice Hawkins, had remanded a prisoner from time to time without sufficient evidence to support the charge, he was highly censured by the judge, and the proceedings reported to the Executive.

Bail.

Bail.

Bail is one of the most difficult questions with which a summary court has to deal. The comments made

from time to time by the judges in the Superior Courts leave in the mind of the public a feeling, that the magistrates are not governed by the mercy which the legislature had in view in dealing with the detention of a prisoner previous to his trial. It might be well to quote Blackstone on this point: "To refuse or delay bail to any person bailable is an offence against the liberty of the subject in any magistrate by the Common Law. And, lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute that excessive bail ought not to be required, though what bail should be called excessive must be left to the Courts, on considering the circumstances of the case, to determine."

Up to 1848 in all cases of misdemeanour the magistrate was bound to admit to bail.

Discretionary power.

But misdemeanour being found to include many of the more serious and frequent offences, 11 & 12 Vict. c. 42 gave the magistrates a *discretionary power* in all offences therein named, which include practically every misdemeanour.

They must of course be guided by the circumstances of the case, but it may be taken that a *fair and reasonable bail* should be allowed in all cases where there is not a reasonable certainty that by doing so the offender will escape justice.

Person committed for trial, confined for *safety*, not *hardship*.

It must be remembered that a person awaiting trial is only committed to prison in order that he may be safely kept until delivered by the due course of the law, and by the Common Law as well as by statute,

he is subject only to the hardship requisite for the purposes of confinement. Where then it is probable from the surrounding circumstances that bail will sufficiently answer for his appearance when called to trial, there is not one iota of reason for putting him to the hardship of confinement, handicap his defence, and impoverish his family, when the law can be followed and vindicated by a more merciful and humane course. This discretion of the magistrates in granting bail is practically *absolute* so far as *the poor are concerned*, for though the Queen's Bench may give bail when moved for a *habeas corpus*, it is practically open to the defendant of means only. The Lord Chief Justice (Lord Coleridge) and Mr. Justice Smith have continuously urged that bail should be accepted *more freely* than hitherto, and not only in cases of doubt, but in such as are not followed by very heavy punishment. "*It is quite possible*," said the latter Judge, "*that a prisoner cannot get sureties, and in such a case I would recommend that his own surety be sufficient.*"

A magistrate is not liable to an action when he has refused bail *from a mistake* in his duty, and not from any corrupt motive, but where his conduct has not been free from blame, though no malice was shown, he has been condemned to pay the costs of the application.

On the other hand, if he take insufficient bail by reason of *negligence* and *carelessness*, and not by *bonâ fide* mistake, he is liable to be fined if the criminal does not appear.

The amount, of course, is in the discretion of the

magistrates, but should be fixed having regard to the *position of the person charged.*

A magistrate is not at liberty to enter into an investigation of the bail, but merely, whether there be sufficient property free from debts, &c., to answer the amount of the bail.

CHAPTER V.

Punishment.

In a trivial offence it may be found that justice has been satisfied by the charge made and proved, and the publicity given to the proceedings. Again there may be occasions, *e.g. assault,* when a pecuniary offer or payment made to the injured party by the defendant may well have the sanction of the magistrate, feeling that the justice of the case is met without any further interference on his part. When, however, it is felt that there must be some active exercise of the power placed in the hands of the magistrate, there are principles to be regarded that may serve as guides to an uniformity of dealing.

In the English law there has never been any endeavour to adopt punishment to corresponding gradations or shades of guilt. That is left to the mind and disposition of the judge who has to deal with the case. The judges of the higher criminal courts, whose lives have been passed in the practice and profession of the law, feel the difficulty of this question. How then must it be felt by the magistrate, who is no sooner introduced to his official position than he is called upon to exercise his discretionary power?

The powers are limited to a comparatively narrow compass, it is true, yet there remains in his hands the aye or nay *of liberty*, in itself sufficiently serious and onerous to make the thoughtful pause, and the sensitive anxious. Whether the punishment for the offence is to be *severe* or *light* rests in the *discretionary power* of the magistrate. This does not infer that the offender must suffer from the *mere caprice* or private opinion of his judge. As was observed by Lord Mansfield, "This discretionary power when applied to a court of justice means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular."

Powers of Punishment.

Powers of punishment.

In proceeding to deal with a case, the magistrates must always *have regard to the particular Act of Parliament* under which the charge is framed.

Speaking generally in regard to summary offences, they may choose between sending the defendant to prison without the option of a fine, and fining him with the alternative of going to prison in default of payment.

Imprisonment apportioned to amount of fine.

In the latter case the statute has provided that the imprisonment shall be apportioned to the amount of the fine. Thus where the fine does not exceed 10*s.*, the imprisonment shall not exceed seven days; 20*s.*, fourteen days; £5, one month; £20, two months; over £20, three months. The term of imprisonment in default of payment should be regulated by the fine solely, and *not by the amount made up by adding*

the costs thereto. It should be stated that by the Summary Jurisdiction Act of 1879,[1] the scale of imprisonment is regulated by the amount adjudged to be paid by the conviction. The conviction states the amount payable for costs as well as the fine, and the imprisonment therefore *could* be according to the scale of the total. Thus, if a defendant be fined 1*s.*, and 10*s.* costs, fourteen days might be given.

How children may be dealt with.

A child under *seven* has not the legal capacity to commit a crime, and between the ages of *seven* and *fourteen* he is still deemed *doli incapax* but this presumption may be rebutted upon evidence that shows a mischievous discretion. When over seven but under *twelve* he cannot be sent to prison for longer than one month, or fined more than forty shillings.

Whipping.

Where children are convicted of an indictable offence, and the summary court is given power to deal with it, the magistrate may order a private whipping, in the presence, if he or she wishes it, of the parent or guardian of the child. When under the age of *twelve* it must not exceed *six strokes* of a birch rod; between *twelve* and *fourteen, twelve* strokes may be adjudged. The whipping may be in lieu of, or in addition to other punishment.[2] Where a fine is inflicted, the magistrates need not require the money to be paid at once. They may allow time, or take security. When not paid, a warrant of distress may be issued for the seizure of the defendant's goods.

As has been before stated (*ante*, p. 8), one magistrate alone cannot fine to a larger amount than 20*s.*, or

[1] 42 & 43 Vict. c. 49, s. 5.

[2] 42 & 43 Vict. c. 49.

imprison for a longer period than fourteen days. A court of summary jurisdiction has *in no case* power to punish beyond a term of six months' imprisonment.

Care should be taken when "*hard labour*" is desired to be enforced in addition to the imprisonment, that it is authorised by the particular statute upon which the conviction is founded. Should it not be authorised by statute, and "*hard labour*" *is imposed*, the magistrates would be liable as for acting "without their jurisdiction" (see *ante*, p. 11). The more recent Acts, it will be noticed, do not authorise "*hard labour*" for the non-payment of a penalty,[1] and so also under the Act of 1848, where a magistrate has power to commit to prison in default of distress he cannot give "*hard labour*." Hard labour.

On the other hand, magistrates have always *the power of mitigating* the severity of the sentence, and though "*hard labour*" is authorised, they are not bound to adjudge it.

And further where a statute imposes imprisonment for an offence punishable on summary conviction, without giving authority to impose a fine for the offence, yet by 42 & 43 Vict. c. 49, s. 4, if the Court think fit, they may substitute a fine in lieu of the imprisonment.

In dealing with *boys* or *girls* apparently *under the age of sixteen*, and *over the age of ten years* (unless previously charged), magistrates have the power of sending them, if convicted of an offence punishable with imprison- Reformatory school.

[1] Following a recent decision in the High Court hard labour *can* be given in default of payment wherever it can be given in the first instance. —*Reg.* v. *Tynemouth*, 16 Q. B. D. 647.

ment, to a *reformatory school* for a period of not less than *two*, or more than *five* years. The fatal objection to this course, however, is the necessity that the offender should first undergo at least ten days' imprisonment.[1] By the Reformatory and Industrial Schools Act, 1891, the school managers may under certain circumstances apprentice or emigrate the child before the expiration of the sentence.[2]

Industrial school.

Industrial schools are institutions somewhat similar to reformatories, but of gentler regime, and intended for children under the age of *fourteen* found destitute or associating with thieves; and those under the age of *twelve*, charged with *any* offence, but who have not before been previously convicted. A child may be *sent direct to an industrial school* without first undergoing imprisonment.

Leniency of legislature.

The legislature has always taken the view that a magistrate should lean rather to the side of *lenieney* than severity, and we find it provided that though an offence charged has been proved to have been committed, yet if it be of a trifling nature the Court may dismiss the defendant without proceeding *to record a conviction* against him, or upon convicting him may discharge him conditionally to come up for sentence when called upon, or take security for future good behaviour.[3]

This leniency is carried still further by a more recent statute, which provides that where no conviction has been proved against a defendant previous to the offence then charged against him, the Court may by reason of his *youth*, the *triviality of the offence*, or *other extenuating circumstances*, direct him to enter into recog-

[1] 29 & 30 Vict. c. 117. [2] 54 & 55 Vict. c. 23. [3] 42 & 43 Vict. c. 69, s. 43.

nizances with a surety, or sureties, to come up for sentence when called upon. The Court is required, however, before releasing the offender, to be satisfied that he, or his security, has a fixed place of abode, or regular occupation, within the county or place for which the Court acts, or in which the offender is likely to live during the period named for the observance of the conditions.[1]

Taking *security for good behaviour* is a power which can be exercised in many instances with great advantage. It relieves the offender from the degradation of imprisonment, at the same time the law is vindicated by sponsors becoming hostages on his account. If the defendant has a mind susceptible of deliberation, the fact that his friends have staked their reputation as their proof of confidence in him, must greatly influence his future conduct. Security for good behaviour.

It may be here mentioned that a *surety for a person on bail* may surrender the principal, and be freed from further responsibility, whilst the *surety for the peace* or *good behaviour* remains liable for the whole of the time.

In addition to the powers already referred to, magistrates have a jurisdiction in certain cases co-extensive with the civil courts. Thus under the Employers and Workmen's Act of 1875,[2] two or more magistrates are authorised to determine disputes *between masters and workmen* in respect to a sum or sums not exceeding £10 *in amount.*

A still further authority is given to them where there has been an *aggravated assault* by a man on his wife.

[1] 50 & 51 Vict. c. 25.

[2] 38 & 39 Vict. c. 90.

In this instance their jurisdiction is extended to give them the power to grant a judicial separation between a married couple. The whole circumstances may be taken into consideration, and a separation may be granted, though the wife has been guilty of adultery. If, however, there has been no adultery on her part, or if it has been condoned, the magistrates may order the *payment of a weekly sum* by the husband to the wife, and give her the lawful custody of the children.[1]

Restitution of Property.

Restitution of property.

The Court before which a person has been convicted may, in certain cases, deal with the property of the prisoner.

Thus in the case of *larceny*, or stealing of any property, the Court may order, subject to certain exceptions (*e.g.* a valuable security purchased *bonâ fide* for value), its restitution to the owner.[2] Where it appears the property has been sold by the prisoner to some person who had no knowledge of the theft, the Court may, on the restitution of the stolen property to the prosecutor, order any money taken from the prisoner on his apprehension, not exceeding the amount of the proceeds of the sale, to be delivered up to the purchaser.[3]

Where goods have been *unlawfully pawned*, the Court, on proof of the ownership of the goods and chattels may, if it thinks fit, order their delivery to the owner, *with or without* payment to the pawnbroker of the

[1] 41 Vict. c. 19. [2] 24 & 25 Vict. c. 96, s. 100.
[3] 30 & 31 Vict. c. 35, s. 9.

amount of the loan, according as the circumstances of the case require.[1]

Costs.

Costs. It has grown into a very common practice in summary courts when adjudging a fine, to add the *costs* as a matter of course, and without sufficient consideration of the fact that the costs are as much a penalty as the fine.

Magistrates have a large discretionary power in this matter, and the statute has expressly laid it down that when the fine does not exceed five shillings, then, except so far as the Court may think fit to expressly order otherwise, an order shall not be made for payment by the defendant to the informant *of any costs.*[2]

The magistrates must themselves fix the amount, and must not delegate it to their clerk. The sums so allowed must be specified in the conviction or order.

The Principles of Punishment.

The principles of punishment. It has been generally felt in the country at large that the punishment inflicted by courts of summary jurisdiction have, in many instances, been governed rather *by caprice* than by any *well-defined regard* to the *principles* of justice. The public mind is from time to time inflamed by the reports of cases which, from the newspaper context, undoubtedly show a certain disregard in the magistrate's mind to the gravamen of the particular charge. It is certain that all magistrates endeavour to do their duty, yet all do not succeed, nor can they all look at things in the same light. The

[1] 35 & 36 Vict. c. 93, s. 30. [2] 42 & 43 Vict. c. 49, s. 8.

experience of one differs from the experience of the other, and where one is a man of the world in the best sense of the term, there are twelve whose minds are narrowed to the professional or business pursuits to which they have devoted their life.

To have the confidence of the public in the administration of the law, and more particularly in the law which deals with the personal liberty of the subject, is to be assured, humanly speaking, that justice is being done.

To gain that end, it is well that certain *principles* in regard to punishment should be well understood.

The greatest merit a punishment could have would be *to contribute to the reform of the offender.* This is effected, as will be generally admitted, rather by *leniency* than severity. Punishment would *become superfluous,* and therefore a crime, if harshness is used to obtain an end which might be achieved by milder means. The power of imprisonment then should be exercised only where in no other way can the law be vindicated.

Gaol, with its formidable consequences upon the future reputation of those who have been once consigned to it, is a punishment which a thoughtful man will be most reluctant to inflict upon one who hitherto has borne a good character, and to whom it means certain degradation and possible ruin. "A first offence," says a learned writer on Criminal Law,[1] "should be always regarded with pity as possibly a lapse from virtue, the result of weakness rather than wickedness. In such a case repentance and reformation are not only possible but probable, and opportunity

A first offence.

[1] Cox's 'Principles of Punishments.'

should be given to redeem a lost position and a sullied character. A leniency thus shown rarely misses bringing about that which a gaol, with its moral and social degradation, in general fails to achieve."

Every advantage should be taken, therefore, of the legislation which permits the law to be vindicated in a more merciful manner.

Instances do arise, however, where neither leniency nor severity will have any effect on the will. Thus, where the individual offender is a *fanatic*, he acts through a fear superior to the heaviest penalties the law can inflict. As in such a case no human judgment would affect his will, or have a tendency to prevent his repeating the offence, regard must be had *solely* to the public welfare. There are other instances where it becomes very difficult for the magistrate to mete out a just punishment for an offence. This more especially in the case of assaults on wives. If a *pecuniary* penalty be imposed, the probability is that the wife and family suffer greater penury in consequence.

Fanatic.

Assaults on wives.

If *imprisonment* be inflicted, the only means of support for the time being, and maybe for the future altogether, is taken from those dependent on the offender.

If it is not a case serious enough to demand a rigorous punishment as an example to deter others from like acts—and the love and affection of the wife have overcome the sense of injury and wrong—a merciful course should be taken rather for the sake of the innocent family than for any pity to the delinquent.

A well-known writer has said: "Forgetfulness of injuries is a virtue necessary to humanity, but it only

becomes a virtue after justice has done its work. Before that, to forget injuries is to invite their repetition: it is not being the friend, but the enemy, to society." Thus *severity* is held to be the best policy on account of its depriving the party injuring of the power to do further mischief. They say "humanity" should be exercised rather for the protection of those who keep the law, than for those who break it. "Humanity" is a virtue sufficiently great to be extended to both. Facts are stubborn, and this is certain, that punishments of unreasonable severity, especially when indiscriminately applied, have very little effect in preventing crime. Should they be of such a nature as to shock established prejudices, the sympathy of society will be extended to the offender, and contempt for those who administer the law.

Punishments of unreasonable severity

There can be given no hard and fast sliding scale of punishment; much is left to the discretion of the Court. There are some principles, however, which may be regarded as a guide to its distribution; thus—

Rules distributing punishment.

The evil of punishment should be made to exceed the advantage of the offence. Were it otherwise, the law would be disregarded, from the fact that profit was to be derived from breaking it. It must not be taken, however, that an offender who steals twenty shillings, and when convicted is fined ten shillings, has necessarily reaped an advantage. The publicity, loss of character, is in itself the heaviest penalty to a hitherto honest man.

The more deficient in certainty a punishment is, the severer it should be, and of crimes of equal offence, those which a man has the most frequent and easy opportunities

of committing, and cannot be so easily guarded against, should be the more vigorously dealt with. "Ea sunt animadvertenda peccata maxime, quæ difficillime præcaventur."

This principle must not be strained unduly, for it should not be forgotten that herein lies the strongest temptation to commit this class of offence. How many thieves are being constantly made by the shopkeeper in the display of goods and wares at his door, on the footpath, and over every available inch of ground! What ragged or hungry one can resist the impulse to take from the plenty that which they so sorely need?

Where two offences are in conjunction the greater offence ought to be subjected to the severer punishment in order that the offender may have a motive to stop at the lesser.

Thus a man who steals a penny should not have to bear the same penalty as he who, in order to take it, first knocks down the possessor.

The same punishment for the same offence should not be inflicted on all delinquents in like manner.

Some attention must be paid to the circumstances which affect *sensibility*. Thus the same pecuniary punishment might be a trifle to the rich, and oppressive to the poor; the same imprisonment might mean death or ruin to one where it did not affect the other.

Analysis of crime.

An *analysis of the crime itself* will often establish the amount of moral guilt.

It may arise from *wantonness* in which there is more inconsiderate folly than actual wickedness, or from *passion* where the injury done is not a measure of the moral degradation. Man is often governed by *sudden impulses*, and crimes are committed from *temptation*,

which, from the want of any settled design, cannot be placed in the same category as those arising from deliberate calculation and involving a certain amount of skill and education to their achievement, such as those of *fraud* and *breach of trust.*

With regard to crimes of *violence and brutality* it must be remembered that the stability of society depends entirely on the confidence that rests in the *personal security* of its individuals. The aim of the administrators of the law must be therefore to repress with a strong hand anything tending to the *insecurity of the individual,* and so where a crime is a *prevalent* one in a particular district, it should be more strictly and severely dealt with than if it had been merely an *isolated* case.

Character of offender.

Finally, the *character of the offender* should bear some influence on the apportionment of punishment. Thus the professional thief is a long way removed from the one who fell because he was too weak to resist a sudden temptation. To the former crime is no sin, and brings no reproach, for he was educated for it, and lives by it. Whether it be choice or it be necessity that leads to crime, it is a *demarkation* that should affect in a great degree the penalty to be inflicted.

In conclusion, it is hardly perhaps necessary to urge the importance in every charge of weeding the *criminal* from the *vicious* element. The magistrate has to administer the law in the punishment of those acts which the law forbids, and the offender against the moral code alone must be left to be dealt with by the pressure of public opinion.

Appeals.

Appeals.—Where the complainant or defendant is dissatisfied with the decision of a court of summary jurisdiction, he has in many cases a right to *appeal to Quarter Sessions.* He has, however, no general right of so doing by the Common Law, but only where provision is made by statute. It is necessary, therefore, to ascertain whether the statute under which the particular proceedings are taken, allows an appeal. Appeal to Quarter Sessions.

The Summary Jurisdiction Act[1] gives the right of appeal to Quarter Sessions (specifying the procedure to be adopted) to every person not pleading guilty who on conviction has been sentenced to imprisonment *without the option of a fine,* and in the metropolitan district where the fine exceeds £3.

In other cases the decisions of magistrates may be overruled, and their proceedings reviewed by the Queen's Bench Division of the High Court of Justice. — to High Court.

When either party consider the decision of the magistrates on any matter within their summary jurisdiction powers, to be erroneous *in point of law,* or *in excess of their jurisdiction,* they may apply within *seven* days to the magistrates to state the facts of the case in writing, with grounds of their decision. Stating a case for appeal.

Unless the magistrates consider the application to be frivolous (for they have a discretionary power), they should always accede to the proposal. If they should

[1] 42 & 43 Vict. c. 49, s. 19.

refuse to grant a case a certificate to that effect will be given, and the applicant, if he be so minded, may go to the High Court with an affidavit of the facts, and ask it to compel the magistrates to grant a case.

When a case is granted, the appellant *cannot question the facts*, but only the law, and he will also have abandoned any right he might have had to appeal to Quarter Sessions.

Writ of certiorari.

2. Where there has been an excess of jurisdiction or an evident informality in the proceedings, the case may be removed into the High Court by *writ of certiorari.*

— of mandamus.

3. When a magistrate declines to perform a function allotted to his office, he may be compelled so to do by a *writ of mandamus.* If there be any doubt in the mind of the magistrate as to his power to act in a particular case, he should refuse to act until an order is obtained from the Queen's Bench, in which case he will free himself from any personal responsibility.

— of prohibition.

4. A magistrate may be prevented from proceeding with a case by a *writ of prohibition.*

— of habeas corpus.

5. When it is desired to ascertain the legality of a person's imprisonment there remains the *writ of habeas corpus.*

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